STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ROBERT LANCE PROPP,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 343255

Circuit Court No. 16-42719 FC

SAGINAW COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

STEVEN D. HELTON (P78141)
Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Statement of Questions Presented

I. Robert Propp's attorney informed the trial court of the nature of the prosecution's case and how the expert he sought funds to retain would benefit the defense and be useful to the jury. The trial court denied Mr. Propp's motion for funds to retain the expert because counsel could only relay to the court how Mr. Propp told him the decedent's death had occurred, and could not cite "record evidence" during the pretrial hearing to support the offer of proof.

Did The trial court violate Mr. Propp's due process rights when it refused to grant funds for the expert?

Robert Propp answers, "Yes."

The Court of Appeals answered, "No."

The Prosecution answered, "No."

The Trial Court answered, "No."

II. Mr. Propp's attorney told the trial court why the testimony of the proposed defense expert was relevant and explained why it would be helpful to the jury during a pretrial hearing. The court ruled that the defense could not present the expert testimony at trial because counsel could only relay to the court how Mr. Propp told him the decedent's death had occurred, and could not cite "record evidence" during the pretrial hearing to support the offer of proof. At trial, the expert would have rebutted the testimony of the state's expert that the decedent's death could not have been an accident, and would have corroborated Mr. Propp's trial testimony that it had been an accident and his explanation for why he did not seek medical attention after the decedent lost consciousness.

Did the trial court violate Mr. Propp's due process right to present a defense and Rules 402 and 702 of the Rules of Evidence, resulting in a miscarriage of justice, when it prohibited him from calling the expert to testify at trial?

Robert Propp answers, "Yes."

The Court of Appeals answered, "No."

The Prosecution answered, "No."

The Trial Court answered, "No."

III. The trial court granted the prosecutor's motion in limine to admit, *inter alia*, hearsay evidence under MCL 768.27b for which no exception to the general rule against hearsay exists. At trial, the prosecutor proved the mens rea elements of first degree murder primarily through hearsay accounts of Mr. Propp physically and emotionally abusing the decedent prior to her death.

Did the trial court violate Mr. Propp's due process right to a fair trial and violate Rules 402, 403, and 802 of the Rules of Evidence, resulting in a miscarriage of justice, when it allowed him to be convicted of first degree murder based on inadmissible evidence?

Robert Propp answers, "Yes."

The Court of Appeals answered, "No."

The Prosecution answered, "No."

The Trial Court answered, "No."

Judgment Appealed From and Relief Sought

The opinion the Court of Appeals published in this case places conditions on indigent defendants' access to experts that that were not present in *People v Kennedy*, 502 Mich 206 (2018), which will often prevent them from receiving the assistance of an expert that due process requires. The opinion simultaneously expands evidence trial courts must admit pursuant to MCL 768.27b and MCL 768.27c far beyond what the Legislature intended and our Constitution permits. (Appendix A) Chief Judge Murray's concurrence disagreed with the two central holdings of the majority. (Appendix B) This Court should grant leave to appeal to resolve the important questions this case presents.

A jury convicted Robert Propp of premeditated murder. The prosecutor proved premeditation and intent with testimony from several witnesses who described stories they had heard about him being physically and emotionally abusive to the decedent, Melissa Thornton. The jury likely disregarded Mr. Propp's testimony that he accidentally killed Ms. Thornton because it was unfairly prejudiced against him before he took the stand, and because the state's pathologist claimed her death could not have been accidental. The trial court denied Mr. Propp's motion to exclude the hearsay testimony without explanation. It denied his motion for funds to retain an expert who would have rebutted the state's pathologist because it refused to accept his attorney's offer of proof as to how Mr. Propp claimed Ms. Thornton died, and demanded counsel point to "record evidence," which counsel could not do prior to Mr. Propp's trial.

In *Kennedy*, 502 Mich at 228, this Court held that due process requires indigent defendants be provided state funds to retain an expert when they "show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." To satisfy this requirement, the

defendant "must inform the court of the nature of the prosecution's case and how the requested expert would be useful. … In addition, the defendant should inform the court why the particular expert is necessary." *Id.* at 227. "[I]f the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense." *Id.*

In its first published opinion analyzing the standard *Kennedy* announced, the Court of Appeals concluded that *Kennedy* requires far more from indigent defendants than is required in other jurisdictions that utilize the standard announced in *Moore v Kemp*, 809 F2d 702 (1987), which *Kennedy* adopted. Prior to trial, Mr. Propp's counsel advised the trial court that Mr. Propp was not guilty of murdering Melissa Thornton by strangulation because he had not intended to kill her. Counsel informed the court how Mr. Propp told him she had died: They were having consensual sex when Ms. Thornton asked him to choke her. They regularly engaged in 'erotic asphyxiation' and it was common for her to pass out, then wake up later. This is why he did not try to revive her or call 9-1-1. He did not tell the police how she died because he was embarrassed. Counsel informed the court that he needed an expert in erotic asphyxiation because he could not explain the practice and why people engage in it to the jury. The expert was also necessary because he would testify that people die accidentally each year while engaged in the practice. However, the trial court denied funds for the expert because counsel could not cite to any portion of the pretrial record in which Mr. Propp personally stated Ms. Thornton died during erotic asphyxiation.

The most glaring flaw in the majority's *Kennedy* analysis was its holding that a defendant charged with open murder who seeks an expert to raise doubt about his intent to kill is asserting an affirmative defense. Based on this conclusion, it held Mr. Propp to a higher standard than if it believed he sought an expert to confront the prosecution's proof. This misconception prevented

the majority from applying the correct standard to Mr. Propp's case. Its more subtle misinterpretations of *Kennedy* may be more detrimental to indigent defendants moving forward.

First, the majority concluded that a defense attorney's offer of proof as to what the defendant says occurred cannot serve as an alternative to "record evidence," i.e., the defendant's personal statement or testimony. This holding denies equal justice to indigent defendants like Mr. Propp because it requires them to decide between providing the state valuable evidence it can use for impeachment at trial in order to obtain funds for a necessary expert or foregoing expert assistance for the right to wait until the prosecutor rests before deciding whether to submit evidence in rebuttal. The Court of Appeals rejected this argument because *Kennedy* stated the standard it announced struck the right balance. But the standard *Kennedy* adopted requires defendants to provide information. The standard the Court of Appeals announced requires that they submit record evidence.

Second, the majority concluded that Mr. Propp failed to meet his burden of persuasion under *Kennedy* because it believed the trial court rightly found the defense theory the expert would have supported lacked credibility in light of the pretrial proofs the prosecutor had submitted. This holding punishes indigent defendants, like Mr. Propp, for not waiving their preliminary examination. It allows trial courts to determine that no expert could rebut the state's evidence without knowing what the expert would say or find. It also creates a burden that will often be impossible for indigent defendants to satisfy, since expert testimony is often necessary to enhance the credibility of the defense theory, but the trial court can now withhold funds unless it finds that theory credible. *Kennedy* specifically sought to prevent paradoxical requirements like this from impeding access to experts. There are several other problems with authorizing circuit courts to pass on the credibility of the theories of the prosecutor and the defendant based on their reading of

a district court transcript, especially because that reading will often impact the jury's ultimate verdict. This case presents just one example: defense counsel's offer of proof accurately described the events Mr. Propp would testify to at trial, and there was no indication in Ms. Thornton's autopsy that she was sexually assaulted or resisted while Mr. Propp was choking her.

The Court of Appeals majority also found no error where the trial court allowed the prosecutor to establish that Mr. Propp was physically and emotionally abusive to Ms. Thornton through hearsay testimony. It held that MCL 768.27b overrides every Rule of Evidence that it does not explicitly reference. Since the statute only references MRE 403, the majority held that MRE 802 is inapplicable to evidence introduced under the statute. To avoid rendering MCL 768.27c superfluous, the majority held that because MCL 768.27c does not reference MRE 402 or 403, it allows the introduction of hearsay evidence that may be wholly irrelevant or unfairly prejudicial. This Court appeared to have settled this issue when it held that MCL 768.27a, a statute that is parallel to MCL 768.27b, but that applies where the complainant is a minor, does not "foreclose the application of other ordinary rules of evidence, such as those pertaining to hearsay and privilege." *People v Watkins*, 491 Mich 450, 485 (2012). Until this Court overrules the Court of Appeals' holding, MCL 768.27b and MCL 768.27c will foreclose the application of the ordinary rules of evidence by lower courts, including rules pertaining to hearsay and privilege.

This Court should grant leave and clarify that MCL 768.27b does not foreclose the application of MRE 802; that indigent defendants who seek an expert to help cast doubt on an element of an offense need not demonstrate a "substantial basis" for an affirmative defense; and that the "substantial basis" standard can be met by an offer of proof and without record evidence. The Court should vacate Mr. Propp's conviction and remand so that he can receive a fair trial.

Statement of Facts

At approximately 10:00 a.m. on July 6, 2016, Robert Propp called 9-1-1 to report that he had found Melissa Thornton, his ex-girlfriend and the mother of his daughter, in her bed and not breathing. T3,[1] 74-75. When emergency responders arrived Ms. Thornton's was already dead. T1, 77-79. The forensic pathologist who performed Ms. Thornton's autopsy determined that she had died as a result of neck compression. T2, 8.

Mr. Propp spoke with police three times in the next forty-eight hours. He provided contradictory accounts of his involvement in Ms. Thornton's death, but ultimately acknowledged that he had pushed down on her neck with his hand before she died. He insisted he had not intended to kill her. Following a two day preliminary examination, Mr. Propp was bound over for trial on one count of open murder.

I. The Admission of Other Acts of Domestic Violence Without Limitation

The prosecutor filed a motion in limine to admit evidence that Mr. Propp had previously committed other acts of domestic violence against both Ms. Thornton and his ex-wife Deanne Hollingshead. (Appendix C – Prosecution's Pleadings re: Other Acts Evidence) Mr. Propp objected to the motion for multiple reasons, including that some of the proposed testimony was hearsay and some of it was not relevant or unduly prejudicial. (Appendix D – Defendant's Pleadings re: Other Acts Evidence) Following an evidentiary hearing on the motion, Mr. Propp filed a supplemental response, arguing that the hearsay evidence should not be admitted because it did not comply with the requirements of MCL 768.27c, in that none of the statements had been

[1] Transcripts of the trial are identified as follows: 2/6/18 Trial Transcript = T1; 2/7/18 Trial Transcript = T2; 2/8/18 Trial Transcript = T3; 2/13/18 Trial Transcript = T4.

made to law enforcement officers. (App. D, 7-13) He also asserted that his ex-wife Deanne Hollingshead's non-hearsay claims were not probative and unfairly prejudicial. (App. D, 8-9)

The trial court granted the prosecutor's motion in its entirety, allowing all other acts and character evidence to be admitted at trial to help establish that Mr. Propp had a premeditated intent to kill Ms. Thornton, regardless of whether it was hearsay, relevant, unduly prejudicial, or otherwise inadmissible under the Michigan Rules of Evidence. (Appendix E – 10/26/17 Opinion and Order) On the first day of trial before the jury had been selected, Mr. Propp's counsel "place[d] on the record a continuing objection as it relates to hearsay evidence that we anticipate coming in, in the form of victim's statements. We, of course, have litigated this issue, and rather than object to each and every witness that makes a statement, I'd like the record to reflect that we have a continuing objection as it relates to that." T1, 7.

II. The Denial of Mr. Propp's Motion for an Expert to Testify in Support of the Defense

Mr. Propp filed a motion for appointment and payment of an expert witness. He asserted:

> The only issue in this case has to do with Defendant's intent; Defendant maintains that the death of the victim was an accident, resulting from Erotic Asphyxiation, a defense that has been recognized in Michigan, but is not generally known about, indicating the need for the appointment of court-appointed expert witnesse[s], and Defendant cannot safely proceed to trial without one. *In re Klevorn*, 18[5] Mich App 672, 463 NW2d 175 (1990).
>
> The frequency, specifics, and dangers associated with this often secretive sexual activity, will need to be explained and will require specialized testimony from a qualified witness.
>
> Counsel is retained, but is being compensated on a sporadic payment basis; Defendant is indigent and otherwise completely unable to provide funds to retain his own expert. *People v Davis*, 199 Mich App 502, 503 NW2d 457 (1993).

> Defendant is entitled to present an adequate defense, and the court should authorize the appointment and payment of an expert regarding the sexual phenomenon known as Erotic Asphyxiation.

(Attachment F – Motion for Appointment of Expert and Brief in Support)

At the hearing on Mr. Propp's motion, his attorney advised the court that he had identified an expert witness in erotic asphyxiation, 1/8/18, 9, and explained to the court why the expert was necessary to support Mr. Propp's defense:

> [E]rotic asphyxiation [is] where partners choke each other to intensify their experience. It's not something that's generally known or understood. …
>
> However, there is a history of this. … [T]he expert that we're calling is an expert that was consulted as far as that case was concerned.
>
> The law says that we have to establish a nexus between the need for that expert and the facts of the case.[2] The facts of the case that are without any argument are that this young woman died as a result of neck compression, and that this young man was involved in that neck compression.
>
> What we're saying, there also was no evidence of any defensive wounds that would suggest that there was any fighting or anything going on. This is something that a jury may not understand. Heck, I don't understand it for that matter, and don't feel competent in trying to explain to a jury what happened here.
>
> We have a psychologist that can explain it, that it exists as a phenomena [sic] in the sexual world like other—many other things do. And he can explain to us what the reasons are that people do this, why they take this risk, what the risk is. And talking with this gentleman, he told me we have two to three deaths a year here in Michigan on the college campuses as a result of either auto or erotic asphyxiation. So it's something that happens. And the only way we're going to be able to explain to a jury that this happens is to have an expert sit in front of them and tell them, this is the circumstance, this is the phenomena, this is why they do it, this is what happens as a result, and this is the danger as a result. I'll also tell you that I spoke to Dr. Virani and asked him, under the circumstances of this case, neck compression, could—could

[2] This motion was filed before *People v Kennedy*, 502 Mich 206 (2018) issued. The parties and the Court of Appeals agree that *Kennedy* provides the applicable standard on appeal.

> this have been the result of an auto—or excuse me, erotic asphyxiation? And he said, yes.
>
> So, in order for him to be able to present this defense, we got to have someone who can explain it to the trier of fact. And that's not me, Your Honor, and I don't think it's the prosecutor. I think it's a qualified expert who needs to do that. That this is this young man's defense on an open murder charge where, for all practical purposes, his entire life will be affected. [1/8/18, 10-12]

After providing the prosecutor an opportunity to respond, the trial court asked defense counsel where there was record support for the theory that Ms. Thornton had died as a result of erotic asphyxiation. Defense counsel responded: "I don't know where in the record [Mr. Propp] could have laid out that defense." The court responded, "Exactly. There's nothing there that says that. He gave two statements in this particular case, neither of them mentioned that possibility." 1/8/18, 13-14. The following exchange then occurred:

> MR. JOHNSON: I understand that, Your Honor, but that is what his claim is. In fact, the reason that he gives, Your Honor—
> THE COURT: Listen to my question, though. That's his claim. And he gave two statements that he didn't claim that in either one of them.
> MR. JOHNSON: I understand, Your Honor, and he didn't claim it for either one of them because he was embarrassed, and embarrassed for the victim.
> THE COURT: Okay.
> MR. JOHNSON: It was only after I sat down and talked to him and said, now, tell me what happened here, here, here. Why? And the big question for me was why, when you laid her on the bed, and that's in the record … and you say that she was breathing, but you laid her on the bed and she was unconscious, why wouldn't you have called the police at that time? And his response to me, Your Honor, … was that it wasn't unusual for her to pass out as a result of this. And that's something that we need this expert—he's going to testify to … that that happens more often than not in erotic asphyxiation, the person being asphyxiated often passes out.
>
> I asked Dr. Virani, when he says he laid her on the bed and she was breathing, was that possible?
>
> Dr. Virani's response to that was that the body does some very strange things under these circumstances that would lead a lay person to believe that they were breathing when he laid her on the bed.

> …I would suggest to you, also, Judge, that while there's no particular thing in the record where he recognized where he did this, there's also nothing in the record that would suggest that there's any evidence of any injuries … to this young woman, other than the neck compression, that could be attributed to some force or violence. [1/8/18, 14-15]

The trial court continued to focus on the specific statements provided by Mr. Propp when he spoke with police and the fact that Mr. Propp had not mentioned erotic asphyxiation when he provided those statements. 1/8/18, 15-16. Counsel responded, "either way, it's our defense, Your Honor, and we should have a right to present that defense, particularly since there is a nexus between the facts of the case and the need for this expert witness. And the nexus is that this woman died from neck compression. There's nothing that suggests that there was any violence beyond that. He claims that it was as a result of erotic asphyxiation." 1/8/18, 16-17.

The trial court then announced that it was denying Mr. Propp's motion for expert funds. Counsel asked: "Are you denying not only paying for the expert witness but our ability to call this witness?" The court responded: "Yes." 1/8/18, 17.

The court issued a written opinion and order on January 9, 2018, holding that Mr. Propp "has failed to show that an expert in the area of erotic asphyxiation would likely benefit his defense" because "there is no evidence that [Melissa Thornton's] death occurred in the course of this sexual activity as a result of erotic asphyxiation." (Appendix G)

Prior to jury selection, counsel advised the trial court that if the defense could develop the factual record to the court's satisfaction and come up with funds to pay the expert before resting, he would like to revisit the court's prior ruling that he could not introduce an expert in erotic asphyxiation. The court responded, "based upon the court's previous ruling, he won't be allowed to be called at this point in time." The court said that it would issue and explain its ruling if Mr.

Propp was able to retain the expert and had established that erotic asphyxiation was "a legitimate defense." T1, 4-5.

III. Mr. Propp's Trial

The only witness at the trial who knew how Melissa Thornton died was Robert Propp, who testified that on the morning of her death he had choked her at her request for her sexual gratification, that he had not intended to kill her, and, that he did not realize that he had killed her until several hours later because when he left her in her bed that morning he believed she was merely unconscious, which was not an uncommon result of their sexual practices.

A. Mr. Propp and Ms. Thornton's activities immediately before her death

Melissa Thornton's sister Angela was Melissa's roommate, and had been out with Ms. Thornton and Mr. Propp the night before her death. Angela testified that on July 5, 2016, she and Ms. Thornton went to a couple of different bars before going home together. T2, 25-26. The two went out for another drink at LeBoeuf's at around 11:15 p.m. T2, 27. While they were there, Mr. Propp arrived, ordered two drinks, and sat down with them. T2, 27. The two sisters left at around midnight, and Mr. Propp followed them home. T2, 27. Ms. Thornton was making a taco salad and Mr. Propp was mixing a drink when Angela went to bed. T2, 27-28.

Angela testified that she was awoken at around 3:15 that morning by what sounded to her like a car door slamming. T2, 28. "I went and looked out the front door. I didn't see anything. And then I went and looked over the window over the couch and I saw Robert's truck parked two doors down at the empty house. … I went to the bathroom. … I went back to bed." T2, 28.

Angela was woken up again later that morning: "I heard my cat howling in the basement, so I went down there to check on her." T2, 29. While in the basement, she heard "what I thought

was a headboard sound," and assumed Mr. Propp and Ms. Thornton were having sex. T2, 29. "I very loudly talked to my cat to let them know that I was awakened." T2, 29. She then went back to bed. T2, 30. She was awoken about fifteen or twenty minutes later by "a big thump on the floor." T2, 30. She went to the living room and "observed Robert coming out of my sister's room. He was stumbling, like hanging on to the walls." T2, 30. "I asked what the fuck's going on out there.… He said "I fell out of bed." "I told him to keep his drunk fucking ass in bed, some people have to work in the morning." T2, 30. Angela went back to bed. T2, 30.

Angela testified that she woke up at 6:00 a.m. that morning to go to work. T2, 30. When she left her house that morning Mr. Propp's truck was gone. T2, 31. She did not check on Melissa before leaving. T2, 32.

B. The autopsy of Melissa Thornton

Doctor Kanu Virani, the forensic pathologist who examined Ms. Thornton, was qualified as an expert in forensic pathology on behalf of the prosecution. T2, 7. Dr. Virani classified the cause of Ms. Thornton's death as neck compression rather than strangulation because he could not identify injuries to the neck that are generally present when a person is strangled. T2, 14.

Dr. Virani, "could not identify any ligature mark. I could not identify any particular injuries on the front and side of the neck where normally some people are strangled with the human hand I usually see it." When a person strangles another person they apply pressure to the front and side of their victim's neck. T2, 15. Because the person being strangled will inevitably resist, a pattern of bruising on the front and sides of the neck will be present when a person is killed as a result of strangulation. T2, 16. Those patterns were not present on Ms. Thornton's neck. T2, 15-16.

Dr. Virani's "main finding were that she had neck compression. She had the small area of injuries which I could see from outside, like a small bruise on the right side of the lower neck—

upper neck. Multiple bruises on the left side of the lower neck. There was a bleeding behind the skin just in the midline of below the chin. … [S]he also had some pinpoint bleeding, which are also known as petechial hemorrhage, in both eyes, which are strong indication[s] of asphyxia and death." She also had some minor bruises and scratches on her legs, feet and hands. T2, 8.

Dr. Virani testified that "if someone was perfectly strangled, [and] there was no blood flowing back or forth, or air," it would take about one minute to render the person unconscious, and another minute or so to really die. Generally, however, when a person is being strangled, it will take two to three minutes for a person to be rendered unconscious, and then another minute after that for the person to die. T2, 11-12.

In response to a question by defense counsel, Dr. Virani testified that it was unlikely or impossible that Ms. Thornton could have died accidentally during erotic asphyxiation: "If during the erotic asphyxiation, when person is undergoing asphyxiation process and passes out, the other person usually releases the pressure and then, like I say, the brain has still reserve energy to come back. … So if the pressure is not maintained for a minute or two after that unconscious state, then that person would not die." T2, 17-18.

C. Mr. Propp's recorded activities on July 5 and July 6, 2016

Police were able to analyze Mr. Propp's mobile phone and phone records to paint a clearer picture of the events preceding and following Ms. Thornton's death. T2, 155-56; T3, 10-11. The text-messages between the two on the night of July 5 reveal a strained, though not entirely unusual relationship between two young people going through a prolonged break-up. T2, 160-64.

Mr. Propp's phone indicated that some time between 2:41 or 4:41 a.m. on July 6th he text-messaged Ms. Thornton: "I went home baby. I'm tired. You were passed out after the bar. I love you. See you in the morning." T2, 166; T3, 14-18. At 7:33 a.m. EST on July 6, Mr. Propp text

messaged Ms. Thornton: "I'm so sorry, I love you." T2, 164. One of the prosecutor's experts testified that this message had been deleted from Mr. Propp's phone. T2, 166.

Police were also able to track the movement of Mr. Propp's mobile phone utilizing cell tower records. T3, 22-23. At 5:29 a.m. on July 6, Mr. Propp's phone pinged a cell tower in West Branch. T3, 23. At 6:20 a.m. It pinged a cell tower in Frederic Township, around where Mr. Propp's grandparents own a cabin. T3, 24. His phone's movement can be tracked moving southbound beginning at around 9:00 a.m., a couple of hours later. T3, 23-25.

When police searched Mr. Propp's truck they found a duffle bag that contained his mobile phone, some clothing and some other personal hygiene items, such as a razor, deodorant and a toothbrush. T2, 72-74. Ms. Thornton's wallet was found in the truck's console. T2, 140-41. Police also searched Mr. Propp's business and found a broken safe that they believed belonged to Ms. Thornton. T2, 78-82.

D. Mr. Propp's statements to police

At approximately 10:00 a.m. on July 6, Mr. Propp called 9-1-1 and reported that Ms. Thornton was not breathing. The first officer to arrive at Ms. Thornton's home testified that when he entered the home he saw "a female laying on the bed unresponsive, and the male caller on top of her doing compressions." T1, 79. When he went to help Mr. Propp move Ms. Thornton to the floor, he realized that she was already dead. T1, 79.

The officer testified that Mr. Propp then told him that he had tried to call Ms. Thornton's cell phone. He did not receive a response and knew that she was scheduled to work in the morning, so he drove by her home, found the back door partially opened, and forced it the rest of the way open so that he could get in. T1, 82. Mr. Propp told him that Ms. Thornton had been in her bed by 3:00 a.m. that morning, and that he had sustained a black eye during a fight the previous night at

the Baywood bar. T1, 83-84. Mr. Propp spoke to another officer outside of the house who testified that Mr. Propp "told me that that he came over, he found the back door kicked in but it would not open, and that it looked funny, he said. He picked up a crowbar that was on the ground by the door and used it to open the back door." T1, 107.

A few hours later, Mr. Propp spoke with a detective. He again said he had been in a fight at the Baywood. T2, 89. Police later verified this was not true. T2, 70-71; T2, 89-90, 116-18. Mr. Propp told the detective that after leaving the Baywood, he went back to Ms. Thornton's house and they had sex in her bedroom. T2, 90. He did not mention placing his hands on her neck. T2, 90. He did not mention her falling out of bed or any sort of altercation T2, 93. Afterwards, "he laid next to her until she fell asleep." T2, 90. "[T]hen he said he got up, right around 3:00 a.m. was his statement, and got dressed and … kind of made a lot of noise coming out of the house, he said, when he was on his way out. … and then he left and he said he went to his house and went to sleep." T2, 90-91. Mr. Propp told the detective that he woke up at around 8:00 a.m. that morning and called Ms. Thornton, but could not reach her, so he went to her house. T2, 91. "[H]e said the door seemed funny, and then he noticed a crowbar laying up against the door, and so then he said he forced his way into the house. Then he went to talk about how he went back to his truck and got a second crowbar as well out of his truck to make entry, and then he went in and found her, he said not breathing, and he called 9-1-1." T2, 91-92.

Mr. Propp spoke to the same detective the next day. T2, 88; Px 41. During this interview, Mr. Propp told the detective his black eye came from Ms. Thornton elbowing him after she had begun questioning him about another woman. T2, 96. Mr. Propp also acknowledged that he had placed his hand on Ms. Thornton's neck. T2, 96.

E. Other acts evidence of domestic violence and sexual assault

To show the premeditation and deliberation required to obtain a first-degree murder conviction, the prosecutor relied heavily on character and other acts evidence that was admitted under MCL 768.27b, pursuant to the trial court's order. Nearly one-third of the 23 witnesses called by the prosecutor provided only propensity evidence.

Vivian Colvin

Vivian Colvin, Ms. Thornton's coworker, testified that Ms. Thornton "told me that he had choked her in her sister's bathroom. … He had her neck like that and had her against the wall, and she had told me that she was afraid she was going to pass out because she was starting to see spots or stars and he eventually let her go. … She told me that he told her then, see how easy it would be for me to shut you up." T2, 130-31. When asked if Ms. Thornton indicated to her that Mr. Propp had physically assaulted her on any other occasions, Vivian Colvin testified that "a lot of it was done, she stated, where Willow couldn't see, like, he would pull the back of her hair, like at the bottom of the back of your hair and say things to her where Willow couldn't see what they were doing. I did another time see bruises on her arm, and jokingly, because I already knew what was going on, I said what happened there Melissa?" T2 131-32.

Deanne Hollingshead

Deanne Hollingshead, Mr. Propp's ex-wife, testified that she had been married to Mr. Propp for about eleven months. T2, 100. She acknowledged that Mr. Propp never struck her and never choked her, T2, 106, but claimed that on a weekly basis, "[h]e would force himself on me sexually by holding my hands down.… At some point I just gave up and let him do it." T2, 100-101. They divorced because of Mr. Propp's drug abuse and verbal abuse. T2, 100.

One night after Ms. Hollingshead had moved out of their home, she saw someone attempting to pry into her basement window, so she called the police. T2, 104-105. She testified that officers told her afterwards that they had found Mr. Propp around the block from her house. T2, 104-105. "They said he had a knife that we had bought on our honeymoon." T2, 105.

Ms. Hollingshead testified that Mr. Propp once "picked a fight with my uncle because he wouldn't tell him where I went." T2, 105. She also testified that Mr. Propp once went to her grandmother's house looking for her, and her grandmother told him that she may be at her aunt's house in Chicago, so Mr. Propp showed up at her aunt's house in Chicago looking for her, but she was not there either. T2, 105.

Stefanie Thornton

Stefanie Thornton, Melissa Thornton's sister, never saw Mr. Propp hit, punch, or choke Ms. Thornton, and, unlike her former coworker, never saw any signs of physical abuse, such as bruises. T2, 52-53. However, Stefanie testified at length about stories she heard about Mr. Propp being abusive. According to Stefanie, "right after [their daughter] Willow was born, he shook up a bunch of 2-liters of pop and sprayed them all over the house. And she had just had a C-section, so I came over and I cleaned it up." T2, 48. On another occasion, she claimed Mellissa, "called me and told me she was really upset, crying, because he threw [Ms. Thornton's infinity lights] off of their balcony." T2, 48-49. "[O]ne day I was at work, and my mom called me and said that Rob had took Melissa's phone from her, and Melissa had to go to Delta that night for school, and she was scared that Melissa would be without a phone [] in a snowstorm." T2, 50-51. "[O]ne time Melissa called me over because he had broken a bunch of dishes in the kitchen and Willow swallowed a piece of glass." T2, 48. One night while she and Ms. Thornton were in Detroit, Mr. Propp "called her from the time we left until the time we got back," because, "he was upset because he thought

she was dressed inappropriately." T2, 47. Ms. Thornton told Stefanie that Mr. Propp once admitted to her that he left his children unattended while he was out stalking her. T2, 49-50. "[S]ometimes [Ms. Thornton] would try to leave and [Mr. Propp] would take her keys and her phone and he wouldn't give them back, and on a couple of occasions, he threw them out in the road." T2, 46.

According to Stefanie, Ms. Thornton moved out "because [Mr. Propp] had a drug problem and money problems, and he had stolen from her." T2 46. However, Ms. Thornton continued to spend time with Mr. Propp because he "told her that they needed to hang out, or else he was going to take Willow from her." T2, 54.

Miscellaneous Other Other-Acts Witnesses

Rikki-Jo Cunningham, Ms. Thornton's friend, never saw any signs that Mr. Propp physically abused her. T2, 139. However, she testified that Ms. Thornton moved out of the house she shared with Mr. Propp, "[b]ecause I was told that he had a coke problem." T2, 135-36. Mr. Propp "would constantly be texting her and calling her nonstop," and Ms. Thornton "said she saw his vehicle pass a couple of times," when they were at a bar together. T2, 136.

Another friend, Erika Betts, testified that Ms. Thornton told her that she and Mr. Propp were not getting back together after they broken up, but that "if I don't cooperate with him, he threatens me that I won't see my daughter, Willow, again, he'll keep her from me, and, you know, I'm afraid of what he might do." T2, 125. Ms. Betts asked Ms. Thornton about the status of her relationship with Mr. Propp because she had seen a lot of pictures of them together with their daughter on Facebook after she heard they had broken up. T2, 125

F. Robert Propp's testimony

Mr. Propp denied he was ever physically abusive to Ms. Thornton, though he admitted to calling and texting her compulsively. T3, 56-57, 62-63, 76. He and Ms. Thornton were attempting

to work on their relationship before her death. T3, 55-56 He never threatened to take Willow away from her if she did not spend time with him. T3, 79. He never hit Ms. Thornton. T3, 79. He never choked Ms. Thornton other than as an aspect of their sex life. T3, 79.

Mr. Propp testified that he had choked Ms. Thornton during sex multiple times before the morning of June 6. T3, 60. He and Ms. Thornton had been having difficulty in their sex life, and had tried numerous things. T3, 60-61. At one point Ms. Thornton suggested erotic asphyxiation, which she had engaged in with a previous boyfriend. T3, 60-61. "[H]e would choke her … and she would see stars and then he would stop." T3, 60. A little more than a year before her death, while they were having sex, Ms. Thornton said to Mr. Propp, " 'I want to see stars.' And I asked her what that meant, you know, and she related back to me what she had told me. And so we had talked about that and she—we tried that. From there, it helped you know, … with her climax." T3, 62.

Even though Mr. Propp and Ms. Thornton had broken up prior to her death, they continued to spend time together. T3, 55-56. He had spent the night at her home on July 4, and watched their daughter at her home the next morning while she was at work. T3, 54-55.

On July 5, Mr. Propp asked Ms. Thornton if he could join her at LeBoeuf's bar and she agreed. T3, 50. He met Ms. Thornton outside of the bar and then came in and had a drink with her and her sister. T3, 50. When Ms. Thornton and Angela were getting ready to go home, he asked if he could join them. Ms. Thornton said he could, so he drove separately to their home. T3, 51-52.

The three hung out in the living room for a little while until Angela went to bed. T3, 52-53. Mr. Propp and Ms. Thornton then went to Ms. Thornton's bedroom to go to sleep at around one or two in the morning. T3, 58.

> We laid there both awake, we cuddled, and spooned and whatnot, and I proceeded to, you know, kind of, you know, kiss her neck and do things like that. And we initiated, you know, she kissed me back. So we kind of—we proceeded to have sex.

> ...
> We had normal, missionary sex, and I had—I had come. And I rolled over for a minute and laid there, and she kind of looked at me, you know, afterward. We kind of laid there afterward, and she says, well, you had come, now it's my turn. And we proceeded to, you know, get together again. And we had—I performed ... oral sex. And we changed position on the bed to where she was under me and I was on top of her, and we had—I did that, the oral sex. And I moved about to her upper body, and we proceeded from there to a position that we call extreme sex.
> ...
> We call it extreme sex. It was where I, you know, she would place her hands—my hands—she would place them on her neck so that it would be, you know, pressure on her neck for exhilaration to help her. [T3, 58-60]
> …
> I was on top of her. We were sideways on the bed, and her neck—her head was tilted over the side because it would—it would help with the—with the feeling. And she was—we were going at it, and my feet were towards the wall. And I don't know if I pushed off from the wall or whatnot, but we fell, her underneath me, me on top of her, my hands still—still there. I was struck—it was like a flash, a bang in my face. [T3, 65]
> …
> [W]e were going back and forth, and I'm not really sure whether my feet against the wall, pushed the wall, pushed us onto the floor, or if just was the motion. [T3, 93]
> …
> When we fell, the rug on the floor pushed the dresser against the wall and it fell on us. And I don't recall how long it was on top of me. [T3, 60]
> …
> My feet, I believe, were partially on the bed, and part of me was on the floor … underneath the dresser [with Melissa under me]. [T3, 94]
> …
> I tried to get up. I put my hands down to get up, and put my other hand out to get the dresser off, and it was on Melissa. [T3, 60]

Mr. Propp testified that he believed Ms. Thornton was still conscious while he was choking her on the bed. T3, 102. His hand remained on her neck while they slid down off the bed onto the floor. T3, 102. He saw stars when the dresser fell on top of him: "I don't know if I blacked out. I was just unaware." T3, 112. He did not know how long the dresser was on top of him before he

was able to get up. T3, 97, 101. He pushed down with his hands to raise the dresser off of himself. He was not thinking about his hands at that point. T3, 112. His reflexes were impaired from alcohol, which he believed may have delayed his reaction time when he and Ms. Thornton slid off the bed. T3, 108. He did not intend to kill Ms. Thornton. T3, 76.

Mr. Propp eventually got the dresser off himself, and "once the dresser was up against the wall … Melissa had passed out like she … had frequently done. It was what happened. It was part of … the final climax of it. So I helped her back in bed, placed her in bed." T3, 66. Mr. Propp testified that he thought Ms. Thornton was okay at that point. T3, 66, 76. "[S]ometimes she would pass out, and it would be normal. … I didn't think anything otherwise." T3, 67. Mr. Propp then went to use the bathroom, which is when he encountered Angela that morning. T3, 66. He testified that while using the bathroom he felt an impulse to use drugs, so he returned to Ms. Thornton's room, gathered his things from her room, and quietly left. T3, 67. From Ms. Thornton's home, Mr. Propp went to his own house and got some drugs. T3, 68. He then drove to his shop and sat in the parking lot while he drank a beer and did the cocaine he had retrieved from his home. T3, 68.

Mr. Propp found Ms. Thornton's wallet in the console of his truck, and for reasons he said he could not explain, used her credit card to purchase cigarettes, soda, and gas. T3, 68. He was concerned that Ms. Thornton would find him while he was high on cocaine, and would know to look for him at his home or his shop, so he decided to drive to his grandfather's cabin. T3, 69. At some point before he left Saginaw he text-messaged Ms. Thornton. T3, 72. He denied manipulating his phone to alter the time stamp. T3, 72.

When Mr. Propp arrived at his grandfather's cabin, he saw vehicles parked there and realized that his aunt and uncle were there, so he began to drive back to Saginaw. T3, 71. He pulled

over and used some more cocaine. T3, 71. He attempted to call both Ms. Thornton and her mother, but could not get a signal, so he proceeded to drive back to Saginaw. T3, 72.

Mr. Propp drove directly to Ms. Thornton's home. T3, 72. He knocked on the front door, and, receiving no response, knocked on Ms. Thornton's bedroom window. T3, 73. When she did not answer, Mr. Propp became nervous because Ms. Thornton's car was parked outside and she was supposed to be at work, so he used a crowbar to open the back door. T3, 73-74. He attempted to wake Ms. Thornton up, but "[s]he didn't move." T3, 74. Realizing that she was unresponsive, Mr. Propp called his mother. She told him to call 9-1-1. He followed her advice. T3, 74.

The 9-1-1 operator instructed Mr. Propp to administer CPR to Ms. Thornton, which he continued to do until the paramedics arrived and the officer told him that she was dead. T3, 75.

Mr. Propp testified that he did not tell police what had actually occurred because he was attempting to keep details of his and Ms. Thornton's sex life private, and because he did not want his drug problem to be exposed. T3, 70. He lied to police about his black eye because "it looked horrible." T3, 70, 78. He believes he received the black eye when the dresser fell on top of him. T3, 112. He lied to police about returning to his house because he wanted to hide his drug problem and because "[i]t looked suspicious." T3, 78. He lied to police about backdoor because "[i]t looked bad … to be breaking into a house." T3, 73.

G. The rebuttal, closing arguments, verdict, and appeal to this point

The prosecutor called a rebuttal witness to testify that he had sex with Ms. Thornton when she was in her late teens, and that they had not engaged in erotic asphyxiation. T3, 118-20.

The prosecutor told the jury that the sole issue before it was Mr. Propp's intent, and argued that Mr. Propp's intent could be gleaned from the testimony of multiple witnesses who claimed Mr. Propp abused and stalked Ms. Thornton. T4, 4. In urging the jury to find Mr. Propp guilty of

premeditated murder, he cited Ms. Coleman's testimony that "defendant grabbed Melissa Thornton by the neck and squeezed her, and she saw stars, and he said, see how easy it would be to shut you up." T4, 4. Defense counsel agreed that the only issue was Mr. Propp's intent. T4, 14.

The jury found Mr. Propp guilty of first degree murder. He was sentenced to life in prison without the possibility of parole.

Mr. Propp appealed of right, challenging the trial court's orders denying him funds for an expert in erotic asphyxiation, and prohibiting him from presenting such an expert in the event he had been able come up with the funds for the expert. Mr. Propp also challenged the admission of hearsay and unduly prejudicial evidence of other acts of domestic violence over his objection. The Court of Appeals issued a published opinion in which majority opinion found no error had occurred, (App. A), and the concurrence found he was not prejudiced by these errors. (App. B)

Robert Propp now seeks leave to appeal, and ultimately a new trial.

Arguments

I. The trial court violated Mr. Propp's right to due process, equal protection, and to present a defense by denying his motion for the appointment of an expert in erotic asphyxiation.

Issue Preservation and Standard of Review

Mr. Propp preserved this error by filing a motion for expert funds and then arguing in support of that motion.

This Court has not yet announced the proper standard for reviewing a trial court's denial of expert funds under *People v Kennedy*, 502 Mich 206, 227 (2018).

Discussion

As the United States Supreme Court explained in *Ake v Oklahoma*, 470 US 68, 76 (1985):

> [W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

In *Kennedy*, 502 Mich at 227 this Court adopted the standard articulated by the United State Court of Appeals for the Eleventh Circuit in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987). To be entitled to appointment of an expert at government expense, "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712. "[I]f a defendant wants an expert to assist his attorney in confronting the prosecution's proof—by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution's case and how the requested expert would be useful." *Id.* Conversely, "if the

defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense." *Id.*

The *Kennedy* and *Moore* "reasonable probability" standard strikes a balance between requiring the indigent defendant "provide in detail with a high degree of certainty that an expert would benefit the defense," an "impossible" requirement because defense counsel would need to consult the expert before receiving the funds needed for consultation in order to meet it, and "a bare assertion" that the expert would be helpful, a test that would amount to "expert assistance upon demand." *Id.* at 226-27. The *Moore* test requires something in between. The defendant "must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime." *Id.* And if the defendant wants the expert to help provide an affirmative defense, "the defendant's showing must also include a specific description of the expert or experts desired," and provide an explanation of "why the particular expert is necessary." *Id*. The defendant may not simply "refuse[] to disclose any facts which would show the presence of the witnesses was necessary to an adequate defense." *United States v Abshire*, 471 F2d 116, 119 (CA 5, 1972), cited with approval by *Moore*, 809 F2d at 712 n 9.

A. Mr. Propp did not seek an expert to assist him in presenting an affirmative defense. He should not have been held to the heightened standard.

The Court of Appeals held "defendant sought appointment of an expert in order to assert the affirmative defense that the victim died accidentally while she and defendant engaged in erotic asphyxiation. Accordingly, defendant was required to demonstrate a 'substantial basis for the defense,' " which is a more demanding standard than when the defense seeks an expert to assist his attorney in confronting the prosecution's proof.

To establish Mr. Propp was guilty of murder, the prosecutor was required to prove malice beyond reasonable doubt. See, e.g., *People v Scott*, 6 Mich 287, 292-93 (1859); M Crim JI 16.1, 16.5. "An affirmative defense admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime." *People v Dupree*, 486 Mich 693, 704 n 11 (2010). Defense counsel told the trial court that "Ms. Thornton's death was an accident, occurring as a result of a sexual practice, known as Erotic Asphyxiation," and requested funds to retain an expert in erotic asphyxiation to explain the risks of the erotic asphyxiation. 1/8/18, 11-14.

The Court of Appeals' initial error was in concluding Mr. Propp sought an expert to assert an affirmative defense, and was therefore required to "demonstrate a substantial basis for the defense." This caused the remainder of its *Kennedy* analysis to be inoperative. Mr. Propp was not seeking to excuse or justify murder through insanity or another affirmative defense. He sought the expert to help him confront the prosecution's proof as to the mens rea element of the open murder charge. He informed the court the expert would help him prove he had not murdered Ms. Thornton because he had no intent to kill her. Accident and/or lack of intent are not affirmative defenses.

B Mr. Propp demonstrated a reasonable probability that an expert in erotic asphyxiation would have been of assistance to the defense.

Chief Judge Murray concluded that Mr. Propp established a reasonable probability the expert he requested would have assisted him at trial. (App. B) The majority did not analyze this requirement because it believed that Mr. Propp sought an expert to present an affirmative defense.

In *Moore*, 809 F2d at 712 n 9, the Eleventh Circuit held that the requirement that an indigent defendant establish a reasonable probability that an expert would be of assistance to the defense "is analogous to the requirement that an indigent defendant wishing to obtain the issuance of a subpoena at government expense make 'a satisfactory showing ... that the presence of the witness is necessary to an adequate defense.' " (quoting Fed R Crim P 17(b) and citing *Abshire*,

471 F2d at 119). *Kennedy* and *Moore*, as well as the cases they cite, all take the same view: all the defendant must do to show that the trial court that the expert will be of assistance is inform the court why the expert would be of assistance. *See Kennedy*, 502 Mich at 227 (quoting *Moore*, 898 F2d at 712 ("he must ***inform*** the court of the nature of the prosecution's case and how the requested expert would be useful to him … the defendant should ***inform*** the court why the particular expert is necessary.") and *Abshire*, 471 F2d at 119 (the defendant "must ***state facts*** that show the relevancy and necessity of the requested witnesses testimony.") (emphasis added).

Mr. Propp satisfied this requirement. His counsel informed the court how the requested expert would be of assistance to him, and stated facts that showed the relevance of the requested expert's testimony:

- "Defendant insists that the Ms. Thornton's death was an accident, occurring as a result of a sexual practice, known as Erotic Asphyxiation." (App. F, 1) Mr. Propp did not tell police that Ms. Thornton had likely died as a result of erotic asphyxiation "because he was embarrassed, and embarrassed for the victim." 1/8/18, 14.

- Mr. Propp told his attorney that Ms. Thornton was unconscious when he laid her in the bed, and he laid her in bed rather than calling for help because it was not unusual for her to pass out during erotic asphyxiation. 1/8/18, 17.

- The autopsy of Ms. Thornton concluded that the cause of death was neck compression, and that there was no indication that she had resisted while being choked, which could logically be explained because she consented to being choked during erotic asphyxiation. 1/8/18, 11.

- Counsel had consulted with a psychologist who "can explain to us what the reasons are that people [engage in erotic asphyxiation], why they take this risk, what the risk is." 1/8/18, 11.

- The expert would also testify "we have two to three deaths a year here in Michigan on the college campuses as a result of either auto or erotic asphyxiation." 1/8/18, 11.

- "The frequency, specifics, and dangers associated with this often secretive activity, will need to be explained and will require specialized testimony from a qualified witness." (App. F, 1)

Defense counsel's assertion that Ms. Thornton died accidentally during erotic asphyxiation had corroboration "in the record" when he filed the motion. 1/8/18, 17. The prosecutor admitted Dr. Virani's autopsy report during the preliminary examination. 7/27/17, 3-4. The forensic evidence supported Mr. Propp's testimony that Ms. Thornton's occurred while he was choking Ms. Thornton, but was accidental and she had consented to being choked. The prosecutor's pathologist would explain that there was no bruising pattern around Ms. Thornton's neck, but there would have been had she resisted or fought back while she was being choked. T2, 14-16. Lack of resistance could potentially be explained by heavy intoxication or drug use, but Ms. Thornton's toxicology report showed no drugs in her system and only a .066 blood alcohol level. T2, 14-15. Given the forensic evidence, the most obvious explanation for why there were no signs that Ms. Thornton resisted while being choked was that Ms. Thornton had *not* resisted being choked because, as defense counsel informed the court and Mr. Propp would later testify, she asked him to choke her. T3, 59-60. Additionally, Angela Thornton testified during the preliminary examination that the night before her death, Ms. Thornton and Mr. Propp "were out on the front porch having drinks." 7/27/17, 32. Angela was awoken in the middle of the night and assumed the two were having sex. 7/27/16, 34-35. Given that Angela was Ms. Thornton's sister and roommate, she likely made this assumption based on her knowledge of their relationship at the time.

The trial court, like the Court of Appeals majority's 'substantial basis' analysis, required that Mr. Propp do more than simply have his attorney state facts and advise the court why the expert would be of assistance to him. It repeatedly demanded that he point to evidence already in the record that showed how the expert's testimony would be relevant. This requirement was out of line with the precise wording of *Kennedy* and *Moore*, which recognized that requests for experts are generally made before the defendant has submitted any evidence into the record.

In addition to simply misinterpreting *Kennedy*, the trial court's view, which was endorsed by the Court of Appeals majority, that a defendant must cite record evidence in support of the defense theory violates equal protection.[3] By denying indigent defendants the same right to delay the decision to submit evidence into the record until the prosecution rests, indigent defendants will be put at a significant and unnecessary disadvantage compared to moneyed defendants, who may assess the prosecutor's proofs at trial and then decide whether to present rebuttal evidence. See *People v Loyer*, 169 Mich App 105, 123-124 (1988) and *US v Merriweather*, 486 F2d 498, 506 (CA 5, 1973) ("When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised."). A trial court's decision to deny an indigent defendant's motion for an expert based on an empty record draws a striking parallel to a court's decision to deny appellate counsel based on its assessment of the merits of a potential appeal, which unquestionably does violate equal protection. In *Douglas*, 372 US at 355-56, the Supreme Court held:

> [A] state may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty.
> …
> If he cannot [afford appellate counsel] the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that

[3] *Ake*, 470 US at 87 n 13, specifically left unconsidered the applicability of the Equal Protection Clause in the context of an indigent defendant's request for funds for an expert. The Court should hold that where an expert is necessary to assist in the defense, equal protection requires that the state ensure that indigent defendant receive funds for an expert. See *Griffin v Illinois*¸ 351 US 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.") and *Douglas v People of State of Cal*, 372 US 353, (1963) ("there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"). More pointedly, the Court could simply hold that any procedure that conditions funds for expert assistance on an indigent defendant's waiver of pretrial silence violates equal protection.

> an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required.

The Court of Appeals' opinion endorsed the view that trial courts' pretrial assessment of the credibility of the defense theory may work to prevent indigent defendants from establishing a "substantial" or "factual" basis for the defense expert funds are sought to support. The majority reasoned that: "For the trial court to conclude that there was a substantial basis for the erotic asphyxiation defense, the trial court would have been required to ignore a significant amount of evidence from other witnesses that supported defendant's own contradictory statement that he choked the defendant [sic] while the two were fighting," such as testimony "that defendant had engaged in stalking behaviors," "that defendant's behavior was 'escalating very fast,' " and that Ms. Thornton told a coworker months before her death that "while defendant was choking the victim, he stated, 'see how easy it would be for me to shut you up.' "

A 'credibility' component of a *Kennedy* analysis is procedurally unfair because few defendants will have put on any evidence of their own prior to trial. Credibility is rarely the central focus of a preliminary examination. *People v Yost*, 468 Mich 122, 126 (2003). It was not in Mr. Propp's, as he did not deny committing the actus reus of the charged offense. Allowing trial courts to deny funds because evidence presented during the preliminary examination undermines the credibility of the defense theory will encourage indigent defendants to waive their preliminary examinations. Conversely, moneyed defendants will have the opportunity to gain cross examination material during the preliminary examination without impeding their access to an expert.

Additionally, the "trial court's duty to protect the process encompasses a duty to the defendant, to the public, and to the constitutionally guaranteed role of the jury as determiner of

disputed facts." *People v Lemmon*, 456 Mich 625, 647 (1998). By empowering trial judges to consider the credibility of the defense theory prior to trial, the Court of Appeals has empowered judges to deny defendants the opportunity to develop and present their defense, which will deny juries relevant evidence when they exercise their function of assessing credibility.

Mr. Propp made the first showing required by *Kennedy* and *Moore*. The trial court abused its discretion by denying expert funds because defense counsel could not point to anything "in the record" that showed that Ms. Thornton's death occurred during erotic asphyxiation, and because evidence that undermined Mr. Propp's claim had been presented in the preliminary examination.

C. Mr. Propp demonstrated a reasonable probability that denial of an expert in erotic asphyxiation would result in a fundamentally unfair trial.

"[T]he Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 US at 76. "[F]undamental fairness requires that the state not deny [indigent defendants] 'an adequate opportunity to present their claims fairly within the adversary system.' " *Moore*, 809 F2d at 709, quoting *Ross v Motiff*, 417 US 600, 612 (1974).

At the hearing on Mr. Propp's motion, his counsel explained the nature of the prosecution's case, how his proposed expert would be useful, and specifically described the type of expert he sought and the nature of the information that the expert would relay at trial. In doing so, counsel demonstrated and accurately predicted that the trial would be fundamentally unfair if he did not receive expert assistance. The prosecution claimed Mr. Propp intentionally killed Ms. Thornton by asphyxiation. Mr. Propp alleged that Ms. Thornton's death was accidental and occurred while they were engaged in erotic asphyxiation. The jury was likely to be unfamiliar with the practice of erotic asphyxiation. Defense counsel was not capable of explaining it to them. The proposed expert

would testify that people frequently pass out and less frequently die during erotic asphyxiation, and would explain why people engage in this risky practice. 1/8/18, 9-12. Because Mr. Propp was not disputing that he caused Ms. Thornton's death, the only issue for the jury was his intent. The expert sought by the defense would have supported Mr. Propp's claim that Ms. Thornton's death was accidental by testifying that people are accidentally killed during erotic asphyxiation.

Fundamental fairness required that Mr. Propp be able to call an expert in erotic asphyxiation at trial so that the jury could understand his testimony in context and appreciate that his testimony that he had not intended to hurt or kill Ms. Thornton when he choked her until she lost consciousness was not only possible, it was a risk some people knowingly take to experience the sensation erotic asphyxiation provides. It was evident at the time that Mr. Propp filed his motion that denial of expert funds would result in a fundamentally unfair trial. The prosecutor had filed a witness list naming several individuals who would be qualified as experts and who would provide testimony in support of the prosecutor's view that Mr. Propp had a premeditated intent to kill Ms. Thornton. The prosecutor had been granted its motion in limine to present substantial other acts evidence to establish Mr. Propp's premeditated intent to kill Ms. Thornton based on his prior abusive conduct towards Ms. Thornton and his ex-wife.

The denial of expert funds would mean that to challenge the state's evidence of malice, Mr. Propp would be required to cover far more bases than he realistically and credibly could when he took the stand. He would first be required to explain or deny the substantial other acts evidence. Given the light this evidence would paint him in, it is unclear whether the jury could be open to any aspect of his testimony once the prosecution rested. Next, because most people are likely to be unfamiliar with erotic asphyxiation, Mr. Propp could not simply testify to the events as they occurred, he would have to explain the practice to the jury. But Mr. Propp was not an expert and

could only speak to his own experience, which was limited. Most importantly, Mr. Propp would need to credibly assert that he had not intended to kill Ms. Thornton. Given that the state's expert pathologist would testify that this claim was not credible because once a person loses consciousness the other person will release and the person who passed out will regain consciousness, convincing the jury he lacked intent without his own expert was likely impossible. Mr. Propp could not rebut the pathologist's testimony because he was not an expert and could not cite statistics. The expert he sought funds to retain would have been able to do so by testifying that loss of consciousness is a common occurrence and that accidental death is possible and does occur.

We know from the trial that the denial of expert assistance did, in fact, result in a fundamentally unfair trial.[4] The transcript of Mr. Propp's testimony betrays the fact that he was not comfortable discussing his own sex life and was not capable of articulating what erotic asphyxiation is or how it is generally practiced. T3, 58-62. He could not say whether it is common for people to begin experimenting with erotic asphyxiation later in life. He could not cite statistics, studies, or other accidental deaths that occurred during erotic asphyxiation. He could not speak to the general risks. He could not explain what compels people to take this risk. He could not explain

[4] Mr. Propp alleges a preserved constitutional error, but the concurrence said it would deny relief because in reviewing the evidence presented at trial, "it is not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial," because "the prosecution's expert recognized the practice of erotic asphyxiation, and that the victim's death could have resulted from that practice." Setting aside the fact that Dr. Virani specifically denied Ms. Thornton's death could have been an accident if it occurred during erotic asphyxiation, this analysis conflates whether the trial court committed an error when it denied the motion with the standard of reversal if it did. It also selects the incorrect standard of reversal. See *People v Anderson (After Remand)*, 446 Mich 392, 406 (1994). Error is assessed at the time the error occurred. *United States v Schooner Peggy*, 1 Cranch 103, 110 (1801). The concurrence's prejudice inquiry appears to be more difficult to satisfy than that of *Strickland v Washington*, 466 US 668, 694 (1984), which requires the appellant only make a showing "sufficient to undermine confidence in the outcome" of the trial. The concurrence's reading of *Kennedy* would lead to the perverse outcome of granting relief in cases where counsel errs by failing to request expert funds, but denying relief where the court errs by denying counsel's request for expert funds.

why Ms. Thornton enjoyed being choked. He did not know. Without a clear understanding that people do engage in erotic asphyxiation, how it is generally performed, and that it does involve a risk of accidental death, Mr. Propp's testimony that he had accidentally killed Ms. Thornton while intentionally choking her could not have made sense or been believed by the jury.

The Court of Appeals concluded the trial was not fundamentally unfair because Mr. Propp could ask the state's expert, Dr. Virani, about erotic asphyxiation. But Dr. Virani was not an expert in erotic asphyxiation. Further, when defense counsel asked Dr. Virani about erotic asphyxiation, he testified that the practice will never result in an unintentional death:

> If during the erotic asphyxiation, when the person is undergoing asphyxiation process and passes out, the other person usually releases the pressure and then, like I say, the brain has still reserve energy to come back. … So if the pressure is not maintained for a minute or two after that unconscious state, then [that] person would not die. [T2, 17]

Mr. Propp's defense was that he had not intended to kill Ms. Thornton, and that her death occurred accidentally during erotic asphyxiation. Having a state expert testify that Mr. Propp's claim was not possible made the trial less fair, not more fair. Not only was this by far the most damning aspect of Dr. Virani's testimony, it was not accurate. As counsel asserted when he requested funds, unintentional death is a potential consequence of erotic asphyxiation.[5]

The trial was predictably unfair as a result of the omission of the expert Mr. Propp sought funds to retain. The proposed defense expert would have corroborated Mr. Propp's testimony and rebutted Dr. Virani's testimony.

Reversal is required.

[5] See, e.g., Cox, *Killer choked woman to death after 'erotic asphyxiation' sex game went wrong*, The Sun (March 13, 2018), available at https://www.thesun.co.uk/news/5792774/killer-erotic-asphyxiation-sex-game-aberdeen/.

II. The trial court violated Mr. Propp's due process right to present a defense and the Rules of Evidence by prohibiting the proposed defense expert from testifying.

Issue Preservation and Standard of Review

Mr. Propp preserved the trial court's error in prohibiting him from presenting an expert in erotic asphyxiation by inquiring: "Are you denying not only paying for the expert witness but our ability to call this witness?" The trial court answered "Yes." 1/8/18, 17. The issue is preserved.[6]

The Court generally reviews the trial court's evidentiary ruling for abuse of discretion. *People v Sabin*, 463 Mich 43, 60 (2000). However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington,* 468 Mich 667, 670-71 (2003). Where the court's decision deprives a defendant of his constitutional right to present a defense, this Court should also apply a de novo standard of review. *Sitz v Department of State Police,* 443 Mich 744 (1993).

Discussion

"[T]he threshold inquiry [of whether expert testimony is admissible is] whether the proposed expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue'—is [] not satisfied if the proffered testimony is not relevant or does not involve a

[6] The Court of Appeals wrote that this issue is "arguably waived" by counsel's failure to renew his request to present an expert after Mr. Propp testified, which provided "record evidence" to support counsel's offer of proof that Ms. Thornton died during erotic asphyxiation. On the first day of trial, the trial court indicated it may be willing to revisit its order if Mr. Propp testified and the defense was able to retain an expert, but held that at that point, its initial order prohibiting the expert from testifying stood. T1, 4-5. Failure to renew the request would be more akin to forfeiture than waiver, *People v Carter*, 462 Mich 206, 215 (2000), but it was neither. Defendants are not required to make futile objections or motions to avoid waiver or forfeiture. *People v Taylor*, 387 Mich 209 (1972). Mr. Propp was indigent and could not afford to pay the expert to testify. (App. D, 2, 6). Even if this was not so, to be effective, the proposed expert needed to be presented before Mr. Propp testified so that the jury would be open to Mr. Propp's testimony that Ms. Thornton death was an accident, especially after Dr. Virani testified that this was not possible.

matter that is beyond the common understanding of the average juror." *People v Kowalski*, 492 Mich 106, 122 (2012). Conversely, expert testimony that *is* relevant and *does* involve a matter beyond the common understanding of the average juror satisfies the requirement that the testimony be of assistance to the jury. MRE 702 tracks the language of Rule 702 of the Federal Rules of Evidence. FRE 702 embodies "a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact." *Kannankeril v Terminix Int'l, Inc*, 128 F3d 802, 806 (CA 3, 1997).

"Expert witnesses may perform two roles: explaining evidence to a jury, and acting as the source of evidence for a jury. When the expert speaks in the latter role, we give less deference to a district court's admissibility decision." *Salas v Carpenter*, 980 F2d 299, 305 (CA 5, 1992).

A. The trial court abused its discretion by prohibiting Mr. Propp from calling an expert in erotic asphyxiation.

The trial court abused its discretion by prohibiting Mr. Propp from presenting an expert in erotic asphyxiation. This decision is entitled to less deference because defense counsel made clear that the proffered expert testimony was being utilized as a source of evidence for the jury. *Carpenter*, 980 F2d at 305. Counsel's offer of proof was sufficient to establish that the proposed expert was admissible under MRE 702 and MRE 402.

The proposed expert would have explained the practice of erotic asphyxiation, would have told the jury that people regularly pass out while engaging in erotic asphyxiation, and would have testified that people do in fact die as a result of erotic asphyxiation. (App. F); 1/8/18, 9-12.

This information was relevant because "this is what [Mr. Propp] says happened." 1/8/18, 11. It would assist the jury in understanding Mr. Propp's testimony and in determining his intent because the jury was likely unfamiliar with the phenomena, why people engage in it, and its associated dangers. 1/8/18, 11-12.

The trial court excluded testimony of an expert in erotic asphyxiation not because it believed that the proposed testimony was based in insufficient facts or data, or would be unreliable per MRE 702(1)-(3). Instead, the testimony was apparently excluded under MRE 702's requirement that "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," because the court believed there was nothing "in the record" that indicated Ms. Thornton died as a result of erotic asphyxiation, and apparently concluded the testimony would not be helpful or relevant. As explained above, it is error to require that criminal defendants point to record evidence prior to trial in support of their theory of defense. Mr. Propp's trial counsel is an officer of the court. The trial court abused its discretion in refusing to accept his offer of proof in support of the relevance and helpfulness of the proposed expert.

The Court of Appeals majority asserted that Mr. Propp's proposed expert was unnecessary because he had the opportunity to question "the prosecution's expert pathologist, who was familiar with the practice," about "what erotic asphyxiation involves, why people might engage in the activity, how common it is, or how often it results in injury or death." The majority asserted that on appeal, Mr. Propp did not explain "why the prosecution's expert pathologist, who was familiar with erotic asphyxiation, could not explain the practice." Mr. Propp did not think it was necessary to explain what he considered obvious. Dr. Virani could not explain erotic asphyxiation because "familiarity" does not constitute "specialized knowledge." See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 589 (1993) ("the word 'knowledge' connotes more than subjective belief or unsupported speculation."). Dr. Virani was a pathologist. He did not have and did not claim to have specialized knowledge in erotic asphyxiation. His testimony that death would not result unintentionally during erotic asphyxiation betrays his lack of familiarity with the risks associated with the practice. Dr. Virani's testimony was antithetical and extremely damaging to

the defense theory. It certainly did not serve as a substitute to the testimony of the defense expert that the trial court refused to admit.

This trial court's error prevented Mr. Propp from presenting a defense because the only person who was qualified as an expert who testified about erotic asphyxiation claimed that accidental death does not result from erotic asphyxiation. Dr. Virani's testimony essentially eliminated any possibility the jury would believe Mr. Propp's testimony or that his defense could result in a not guilty verdict. This is fundamentally unfair because Mr. Propp's defense could have resulted in an acquittal, especially in light of Ms. Thornton's autopsy, which corroborated, and was likely best explained by Mr. Propp's assertion that she consented to being choked.

Where, as here, the trial court's error implicates a defendant's constitutional rights, reversal of the defendant's conviction is required unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty even absent the error. *People v Anderson (After Remand)*, 446 Mich 392, 406 (1994); *Chapman v California*, 386 US 18, 23-24 (1967).

Dr. Virani's testimony that accidental death would not result from erotic asphyxiation, T2, 17-18, would have been rebutted by the proffered expert. The prosecution's sole rebuttal witness, Shane Schneider, was called to testify that he had sex with Ms. Thornton in the late 2000's and they never engaged in the practice. T3, 118-19. The materiality of Mr. Schneider's testimony would have been substantially diminished by the proposed expert's explanation for why people engage in the activity, 1/8/18, 12, which could have explained why people may become interested in erotic asphyxiation after becoming sexually active. The expert would have supported Mr. Propp's claim that he left Ms. Thornton's home believing she was alive because she often passed out during erotic asphyxiation by testifying people often do pass out when engaged in the practice. The error was extremely prejudicial. It was not harmless beyond a reasonable doubt.

III. The trial court abused its discretion by allowing the prosecutor to introduce hearsay, irrelevant, and unduly prejudicial evidence of other acts of domestic violence pursuant to MCL 768.27b, which resulted in a fundamentally unfair trial.

Standard of Review and Issue Preservation

This issue is preserved. Mr. Propp objected to the introduction of other-acts evidence of domestic violence that was inadmissible hearsay, that was not relevant, and that was substantially more prejudicial than probative in his February 23, 2017 Answer to Motion in Limine and supporting Brief, during the July 28, 2017 evidentiary hearing on the motion, and in his October 10, 2017 Response to People's Supplemental Brief. (App. D)

When "the decision [to admit evidence] involves a preliminary question of law, [such as] whether a rule of evidence precludes admissibility, the question is reviewed de novo." *People v McDaniel*, 469 Mich 409, 412 (2003). A trial court abuses its discretion as a matter of law when it admits evidence that is inadmissible. *People v Katt*, 468 Mich 272, 278 (2003).

Discussion

The trial court and the Court of Appeals erred in concluding that hearsay accounts of other acts evidence are admissible under MCL 768.27b. They also erred when they concluded that Mr. Propp's ex-wife's testimony that he sexually assaulted her on a weekly basis was "not otherwise excluded under Michigan Rule of Evidence 403," where there was no evidence that Mr. Propp ever sexually assaulted Ms. Thornton.

A. MCL 768.27b does not override Michigan Rule of Evidence 802.

MCL 768.27b allows for the admission of other acts evidence to establish propensity in cases involving domestic violence. It does not, as the trial court and the Court of Appeals held, override the Rules of Evidence when it comes to domestic-violence other acts evidence. MCL 768.27b(1) provides in relevant part: "in a criminal action in which the defendant is accused of an

offense involving domestic violence, evidence of the defendants commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if not otherwise excluded under Michigan Rule of Evidence 403." "Domestic violence" and "offense involving domestic violence" are broadly defined by the statute to include, among other things, "[c]ausing or attempting to cause physical or mental harm," and "[p]lacing a family or household member in fear of physical or mental harm." MCL 768.27b(5)(a).

By its explicit terms, the statute prohibits the introduction of evidence of domestic violence that is not relevant and where the evidence is substantially more prejudicial than probative. The statute was intended to override MRE 404(b)(1) to allow for the introduction of some other-acts evidence to establish propensity in criminal actions involving domestic violence and sexual assault. It incorporates and addresses MRE 401, 402, and 403, and modifies MRE 404(b)(1). The statute was not intended to, and could not practically or constitutionally, override all of the Rules of Evidence, as the trial court and the Court of Appeals concluded. Const 1963, art 6, § 5.

The Legislature did not intend to allow the introduction of hearsay testimony pursuant to MCL 768.27b absent an exception within the Rules of Evidence or provided by MCL 768.27c. Both MCL 768.27b and MCL 768.27c were enacted on the same day, deal with the same subject matter, and should be interpreted *in pari materia*. "Under the doctrine, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law." *People v Mazur*, 497 Mich 302, 313 (2015). Unlike MCL 768.27b, MCL 768.27c does explicitly authorize the introduction of hearsay testimony related to "infliction or threat of physical injury upon the declarant" in trials in which the defendant is accused of an offense involving domestic violence. However, such hearsay evidence is only admissible under MCL 768.27c where, among other things, the declarant's statement "was made to a law

enforcement officer," and "was made under circumstances that would indicate the statement's trustworthiness." "The admission of hearsay evidence is disfavored because it is difficult, if not impossible, for the trier of fact to assess the reliability of hearsay statements or of the hearsay declarant." *People v Dhue*, 444 Mich 151, 160 (1993) (overturned on other grounds). MCL 768.27b is silent as to hearsay evidence and provides none of the safeguards against the dangers present when hearsay is admitted that are present in MCL 768.27c.

In holding that the only Rule of Evidence that applies to MCL 768.27b is Rule 403, the Court of Appeals' majority imagined a purpose MCL 768.27c could still serve if MCL 768.27b also permits the admission of hearsay evidence:

> One statute applies to evidence of domestic violence in domestic violence cases, and one statute applies to evidence of *general physical violence* in domestic violence cases. There is sound logic in the Legislature's decision to provide for broad admissibility under the former rule while constraining the latter to assure the reliability of evidence of other-acts of *general physical violence* because those acts tend to be less relevant than other-acts of *domestic violence* in establishing a defendant's propensity to commit acts of *domestic violence*.

But just as MCL 768.27b's silence as to hearsay cannot be properly interpreted to override MRE 802, MCL 768.27c's silence as to relevance cannot be interpreted to override MRE 402-404. Hearsay evidence introduced under MCL 768.27c must be more directly related to the charged offense than propensity evidence introduced under MCL 768.27b because MCL 768.27c does not override the restriction within MRE 404(b).

Even accepting the majority's position that MCL 768.27c overrides MRE 402-404, it is difficult to imagine a situation in which hearsay testimony about other acts of general physical violence will have any probative value in a domestic violence case. Paradoxically, given that the statements described in MCL 768.27c are testimonial, the declarant must be subject to cross

examination by the defendant for the statement to be admitted. See *Crawford v Washington*, 541 US 36 (2004). Because testimony about general physical violence in a domestic violence case is irrelevant, and neither MCL 768.27b or MCL 768.27c create an exception to MRE 402 for the declarant's direct testimony about general physical violence, the declarant's testimony about general physical violence will be inadmissible because it is irrelevant, but the declarant's extrajudicial account of the general physical violence to a police officer will be admissible. If the Legislature had intended such a perverse result, it would have more clearly stated its intent.

The Court of Appeals found it significant that MCL 768.27b and MCL 768.27c provide that the evidence described "is admissible," which it interpreted to mean that the evidence must be admitted if it complies with the statutes' internal requirements. It contrasted the "is admissible" language in MCL 768.27b and MCL 768.27c, with MCL 768.27a, which does not contain that exact phrase, and which this Court held does not "foreclose the application of other ordinary rules of evidence, such as those pertaining to hearsay and privilege." *People v Watkins*, 491 Mich 450, 485 (2012).

Left uncorrected, the Court of Appeals' published opinion in this case will have a number of bizarre and unfair results. Its interpretation of MCL 768.27b currently requires courts to admit testimony from the defense attorney describing sexual assaults and domestic violence he read his client committed in police reports because neither MRE 501 nor MRE 802 currently apply to "evidence of the defendant's commission of other acts of domestic violence or sexual assault." Its interpretation of MCL 768.27c requires trial courts to admit any statement describing infliction or threats of general physical violence upon the declarant, regardless of whether it was the defendant who inflicted or threatened the injury. Such evidence must now be admitted to allow the prosecutor to build sympathy for the complainant by, for example, establishing that she had previously been

a victim of a violent crime perpetrated by someone other than the defendant. The evidence must also be admitted to inflame the jury against people in the same class or profession as the defendant, by, for example, introducing police reports showing that other accountants have committed other violent crimes. Under the Court of Appeals' broad reading, a defendant in a domestic violence action is entitled to introduce hearsay testimony showing that the complainant had herself threatened or assaulted others in the past to prejudice the jury against her.

The plain language of MCL 768.27b and MCL 768.27c simply does not indicate the Legislature's intent to disrupt the Rules of Evidence to the extent the Court of Appeals held. MCL 768.27b is properly interpreted to authorize the admission of the defendant's prior acts of domestic violence or sexual assault to establish the defendant's propensity for committing the crime he is charged with at trial. It overrides Rules 404(b) and modifies MRE 403. It does not silently override Rules 501 (allowing the witness or defendant to invoke privilege), 602 (requiring the witness have personal knowledge) or 802 (excluding most hearsay). MCL 768.27c is properly interpreted to allow the admission of a hearsay statement to police describing the threat or infliction of violence upon the declarant. It thereby overrides Rule 802. It does not silently override Rules 402, 403, and 404. Such evidence could be admitted to bolster the declarant's trial testimony and as substantive evidence that the defendant is guilty where the declarant denies being abused at trial after reporting the abuse to the police. It may also expand the hearsay exceptions provided in Rules 803 and 804. MCL 768.27c may also be utilized in conjunction with MCL 768.27b, to introduce hearsay evidence of other acts of domestic violence where the requirements of both statutes are met.

The Legislative Analysis indicates that the Legislature enacted each statute to address discrete issues brought to its attention by the Prosecuting Attorneys Association of Michigan, and not to completely override nearly every Rule of Evidence in domestic violence cases. MCL

768.27b was considered necessary because "prosecutors often find that a defendant being charged with a domestic violence offense has committed similar acts of abuse in the past," and "prosecutors contend that it is difficult to introduce relevant information about prior bad acts because judges interpret the rule and its exceptions inconsistently." Senate Legislative Analysis, 2005 SB 0120, SB 0263 (February 2, 2006). "Similarly," MCL 768.27c was thought necessary because, "it is common that a domestic violence victim will make a statement to a police officer or other emergency responder but later may be unwilling to testify in court against the abuser. Some people believe that such a statement should be admissible as evidence of the wrongdoing, regardless of the victim's willingness to testify." *Id.*

As it did when it analyzed MCL 768.27a, this Court should hold "the non-MRE 404(b) rules of evidence, including MRE 403 and the other ordinary rules of evidence, such as those pertaining to hearsay" govern the admissibility of other-acts evidence introduced pursuant to MCL 768.27b. *People v Uribe,* 499 Mich 921 (2016), quoting *Watkins*, 491 Mich at 484-85 (internal quotations and alterations omitted). It should also hold that the non-MRE 802 rules of evidence, including the other ordinary rules of evidence, such as those pertaining to relevance and propensity govern the admissibility of hearsay evidence introduced pursuant to MCL 768.27c.

B. The erroneous admission of hearsay and unduly prejudicial evidence of other acts of domestic violence committed by Mr. Propp denied him a fair trial and resulted in a miscarriage of justice.

The erroneously admitted propensity evidence is described above in Statement of Facts, Section IIII(E), *supra*. Hearsay accounts of Mr. Propp abusing, threatening, and otherwise manipulating Ms. Thornton should not have been admitted. Ms. Hollingshead should not have been permitted to testify that police told her they found Mr. Propp outside of her house with a knife. Nor should she have been permitted to testify that Mr. Propp regularly sexually assaulted

her. There was no evidence Mr. Propp sexually assaulted Ms. Thornton, so this testimony was highly prejudicial, but had no probative value.

The jury's verdict finding Mr. Propp guilty of premeditated murder is only explained by the introduction of the erroneously admitted other acts evidence. No one who testified had personal knowledge that Mr. Propp ever physically or emotionally abused Ms. Thornton.

Absent the trial court's wholesale admission of every bit of the proffered domestic-violence other-acts evidence—including that which was inadmissible hearsay and/or irrelevant—the prosecution's entire body of evidence would have boiled down to just this: Mr. Propp called and text-messaged Ms. Thornton excessively; Ms. Thornton died as a result of neck compression; Mr. Propp acted suspiciously following Ms. Thornton's death and provided inconsistent statements to police afterward. Mr. Propp's explanations for each of these facts made sense and could have easily been believed had the jury not been unfairly prejudiced against him. On the other hand, it is difficult to believe that Mr. Propp could have come up with a worse plan to get away with murder if he had in fact deliberated and plotted course in advance.

However, because the trial court allowed other-acts evidence to be established through hearsay testimony, the jury was also told that Ms. Thornton spent time with Mr. Propp only because he threatened to take their daughter away if she did not, that he was physically abusive to her, and that he previously choked her to the point that she nearly passed out and then told her, "see how easy it would be for me to shut you up." Because the trial court disregarded the requirement that evidence of other acts of domestic violence be relevant and not substantially more prejudicial than probative, the jury also heard that Mr. Propp is a rapist.

The Court of Appeals concurrence found that the trial court erred in admitting hearsay evidence under MCL 768.27b, but concluded that "evidence otherwise properly admitted was

more than adequate for the jury to convict the defendant." Under *Lukity*, it is not a question of whether a reasonable jury could have convicted if the erroneously admitted evidence had not been presented, but whether it is reasonably probable that the error could have affected the outcome in light of the other evidence presented. "Where the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence." *People v Mateo*, 453 Mich 203, 206 (1996). "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Denson*, 500 Mich 385, 397-398 (2017).

No admissible evidence portrayed Mr. Propp as violent or unable to control his anger. Vivian Colvin, who had apparently never met or seen Mr. Propp while Ms. Thornton was alive, was the only witness who testified Mr. Propp was physically abusive to Ms. Thornton. Ms. Colvin testified that Ms. Thornton "had told me that [Mr. Propp] had choked her in her sister's bathroom. … He had her neck like that and he had her against the wall, and she had told me that she was afraid she was starting to see spots or stars …. She told me that he told her then, see how easy it would be for me to shut you up." T2, 130-31. This testimony would have been in the jurors' minds when they decided that they did not believe Mr. Propp's claim that he had not intended to hurt or kill Ms. Thornton when he was choking her, and when it determined that the prosecutor proved premeditation beyond reasonable doubt.

Ms. Hollingshead's testimony that she heard Mr. Propp was found lurking outside her house with a knife after she heard someone trying to break into her home allowed the jury to assume that Mr. Propp had intended to murder his ex-wife that night, even though no one with personal knowledge could confirm he was in the area.

Ms. Hollingshead's testimony that Mr. Propp regularly sexually assaulted her provided the jury a compelling reason to find Mr. Propp guilty even if it had doubts about to his intent to murder Ms. Thornton. Her claim that Mr. Propp held her down to sexually assault her was likely in the jurors' minds when he testified that he was choking Ms. Thornton just before she died.

The prosecutor claimed during opening argument that Mr. Propp likely stole and disposed of Ms. Thornton's phone somewhere near his grandparents' cabin after her death. T1, 67-68. If believed, this would establish that his text messages to her later that morning were sent in contemplation of being prosecuted for murder. The only evidence offered in support of this claim was Angela Thornton's testimony that she heard Mr. Propp previously stole Ms. Thornton's phone.

Stefanie Thornton's and Erika Betts' testimony that Ms. Thornton told them that she only spent time with Mr. Propp because he threatened to somehow take custody of their child if she did not likely foreclosed the possibility that the jury would believe Mr. Propp's claim that he and Ms. Thornton were engaged in a consensual and adventurous sexual relationship just before she died. The state witnesses claimed Ms. Thornton claimed the entire relationship was non-consensual.[7]

No witness had personal knowledge that Mr. Propp had ever threatened Ms. Thornton in any way or had ever been physically abusive to her. Because of the court's erroneous interpretation of MCL 768.27b, Mr. Propp was portrayed as a rapist who nearly killed Ms. Thornton on a previous occasion by choking her without her consent, who threatened to kill her and threatened to take her daughter away from her, and who could not control his anger. It was the prosecution's strongest evidence of premeditation and malice.

[7] This line of testimony is perhaps the best example in this case of why cross examination is generally required. Ms. Thornton appeared to be voluntarily spending time and having sex with Mr. Propp before she died, so there are significant questions about the veracity of the explanation she provided to her friend and sister for why she continued to see a man they disapproved of.

Request for Relief

For the foregoing reasons, Robert Propp respectfully requests that this Honorable Court grant leave to appeal or any other relief it deems just and appropriate.

Respectfully submitted,

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/s/ Steven Helton

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Dated: November 18, 2019